New Jersey Bell Telephone Company *and* Local 827, International Brotherhood of Electrical Workers, AFL–CIO. Case 22–CA–15822

February 15, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND OVIATT

On September 7, 1990, Administrative Law Judge D. Barry Morris issued the attached decision. The General Counsel and Charging Party filed exceptions and supporting briefs. The Respondent filed conditional exceptions, a supporting brief, and a brief in support of the judge's decision. The General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings, and conclusions and to adopt the recommended Order.

ORDER

The complaint is dismissed.

[1] In its exceptions, the Respondent requests that ''the decision of the Administrative Law Judge be affirmed, or, alternatively that the matter be referred to arbitration.'' Because we adopt the judge's conclusion that the Respondent did not violate the Act, we find it unnecessary to reach the Respondent's conditional argument that the dispute should be deferred to the parties' grievance and arbitration procedure pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *United Technologies Corp.*, 268 NLRB 557 (1984).

Renee Crain, Esq., for the General Counsel.
James Brady, Esq., of Newark, New Jersey, for the Respondent.
Paul M. Levinson, Esq. (Mayer, Weiner, Levinson & Weinberg), of Ft. Lee, New Jersey, for the Charging Party.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in Newark, New Jersey, on January 16 and 17, 1990. On a charge filed on July 12, 1988,[1] a consolidated complaint was issued on September 7, 1989,[2] alleging that New Jersey Bell Telephone Company (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally and file briefs. Briefs were filed by General Counsel and by Respondent.

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New Jersey corporation with offices in Newark, New Jersey is engaged in the furnishing of telephone communication services. Respondent's total annual volume of business is in excess of $100,000 and it annually purchases goods in excess of $50,000 from points outside the State of New Jersey. Respondent admits, and I so find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, Respondent admits, and I so find, that Local 827, International Brotherhood of Electrical Workers, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The issues in this proceeding are:

1. Should the case be deferred to arbitration under the parties' collective-bargaining agreement?

2. Did Respondent fail to provide employees with their *Weingarten* rights in violation of Section 8(a)(1) of the Act?

B. *The Facts*

The essential facts are not in dispute.[3] David McLellan and John Reilly are employed by Respondent as cable splicers. They had both been working on Saturday, February 20, 1988. At approximately 3 p.m. they went for lunch in their company truck to a bar on Blanchard Street in Newark. The truck had ''New Jersey Bell'' written on it. The bar was located in an industrial area, and being Saturday, except for the bar being open, the other establishments were closed. McLellan and Reilly had been in the bar approximately 1 hour, until 4 p.m.

Bruce Underwald was employed by Respondent as a manager of its motor vehicle department. He did not supervise either McLellan or Reilly and did not know them. In addition, he had no authority to discipline them, nor did he have authority to make recommendations concerning their discipline. On February 20 Underwald was working as an Essex County sheriff and was paid by the Sheriff's Department. On that day he wore a sheriff's uniform, he had a badge and he carried a weapon. As part of his training he received instruction in standard police procedures to follow where drunk driving is suspected. He credibly testified that in such a situation the normal procedure is to ask the individual for his driver's license and his registration and ask whether the driver would be willing to take a breathalyzer test.

On February 20 Underwald was on patrol on Blanchard Street in Newark looking for illegal dumping of hazardous

[1] All dates refer to 1988 unless otherwise specified.

[2] The instant complaint had been consolidated with Cases 22–CA–16180 and 16367. On January 10, 1990, the Regional Director ordered that those cases be severed from Case 22–CA–15822 and that pars. 2 and 3, portions of par. 8 and pars. 10, 11, and 12 of the consolidated complaint be dismissed.

[3] David McLellan and John Reilly testified on behalf of General Counsel and Bruce Underwald testified on behalf of Respondent. Each of them appeared to be a credible witness. With respect to the facts pertinent to this proceeding, for the most part the witnesses corroborate each other.

waste. It is an isolated area where there is a high volume of illegal dumping and a high volume of stolen vehicles. As he came down Blanchard Street. he observed a New Jersey Bell vehicle parked on the wrong side of the street. with no occupants. The truck was approximately 100-150 feet away from a bar and appeared to him to be abandoned. It was parked next to a stolen vehicle.

Underwald credibly testified that when he comes upon an abandoned public service vehicle or an abandoned vehicle belonging to a large corporation, it is his practice to contact the company to ascertain if someone of responsibility is in the area with the vehicle. In accordance with that procedure, he telephoned New Jersey Bell's maintenance desk to report the vehicle. At the same time he observed a vehicle that had all indications of being a stolen car. He called the information concerning the stolen vehicle to the Sheriff's headquarters and waited until a tow truck came to remove the vehicle.

While Underwald was waiting, he observed two individuals coming out of the bar. They were McLellan and Reilly. Underwald credibly testified that the two appeared to be in a ''joking state'' and they proceeded to walk across to the New Jersey Bell truck. After they entered the truck, Underwald walked up to the driver and asked for his license, his registration, and his I.D. He also asked if they had been drinking. Reilly replied that he had one beer with his sandwich. Underwald asked Reilly whether he would be willing to take a breathalyzer test and Reilly replied that he would if he had to. Underwald did not tell McLellan and Reilly that he was employed by Respondent but he asked them ''do you think Mr. Fedroff would appreciate you guys having a beer for your lunch?'' Fedroff was McLellan's and Reilly's supervisor. Underwald asked the two whether they were aware of the company policy on drinking but he did not ask them any other work-related questions.

Shortly thereafter Pat Ryan, a New Jersey Bell supervisor, appeared on the scene with a clearly marked New Jersey Bell vehicle. Underwald handed McLellan's and Reilly's I.D.'s to Ryan. Underwald did not tell Ryan that he had asked the two whether they had been drinking and he did not make any decisions or any recommendations whether disciplinary action would be taken. At this time Ryan told McLellan and Reilly that Underwald was a supervisor at New Jersey Bell.

On February 26 an investigation was conducted by Fedroff. Both McLellan and Reilly asked for, and were given, union representation. During the investigation they were questioned regarding their activities on February 20. The two employees were subsequently suspended for drinking on the job, being away from the job without permission and falsifying company records.

Discussion and Conclusions

1. Deferral to arbitration

Respondent has moved that the proceeding be deferred to the grievance and arbitration procedure provided for in the collective-bargaining agreement. Whether deferral is appropriate is a threshold question which must be decided in the negative before the merits of the unfair labor practice allegations can be considered. *L. E. Myers Co.*, 270 NLRB 1010 fn. 2 (1984).

In *United Technologies Corp.*, 268 NLRB 557 (1984), the Board reaffirmed and clarified the criteria for deferral as set forth in *Collyer Insulated Wire*, 192 NLRB 837 (1971). The Board stated (268 NLRB at 558):

> The *Collyer* majority articulated several factors favoring deferral: The dispute arose within the confines of a long and productive collective-bargaining relationship; there was no claim of employer animosity to the employee's exercise of protected rights; the parties' contract provided for arbitration in a very broad range of disputes; the arbitration clause clearly encompassed the dispute at issue; the employer had asserted its willingness to utilize arbitration to resolve the dispute; and the dispute was eminently well-suited to resolution by arbitration.

As noted, one of the factors to be considered in determining whether deferral should take place, is whether ''the arbitration clause clearly encompassed the dispute at issue.'' In *Electrical Workers IBEW Local 702 (Central Illinois Public Service)*, 274 NLRB 1292 (1985), the Board declined to defer the proceeding. In a concurring opinion, Member Hunter pointed out that the Board has deferred only in cases where the ''contract has a provision specifically addressing'' the question which would be arbitrated.

Article 19 of the collective-bargaining agreement, dealing with union representation, states:

> At any meeting between a representative of the Company and an employee in which discipline . . . is to be announced, a Union representative may be present if the employee so requests.

In addition, section 2 of article 12 of the collective-bargaining agreement, dealing with arbitration, states:

> The Board of Arbitration in its decision shall be bound by the provisions of this Agreement and shall not have the power to add to, subtract from, or modify any provision of this agreement.

Article 19 provides for union representation at a meeting where *discipline* is to be announced. These are not the rights provided for in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). As stated in *Weingarten*, the Board recognizes that ''Section 7 guarantees an employee's right to the presence of a union representative at an investigatory interview in which the risk of discipline reasonably inheres. . . .'' (Id. at 262.) Thus, *Weingarten* provides for representation at an investigatory interview, whereas article 19 of the collective-bargaining agreement in the instant proceeding provides for representation at a meeting in which *discipline* is to be announced.

In view of the fact that article 19 of the collective-bargaining agreement does not provide for union representation at an investigatory interview and since article 12 of the collective-bargaining agreement provides that the board of arbitration may not add to, or modify any provision of the collective-bargaining agreement, I believe that the agreement does not have a provision which specifically addresses the question of investigatory interviews. Accordingly, I deny Respondent's motion to defer this proceeding.

2. Denial of representation

In *Weingarten*, supra, 420 U.S. 251, during the course of an investigatory interview, at which an employee was being interrogated by a representative of the respondent about reported thefts at the respondent's store, the employee asked for, but was denied, the presence at the interview of her union representative. The Supreme Court pointed out that the right to representation arises ''only in situations where the employee requests representation.'' In addition, the Court stated that the right to representation is ''limited to situations where the employee reasonably believes the investigation will result in disciplinary action'' (id. at 257). Thus, *Weingarten* involved a situation where the company representative was acting in his capacity as a company representative, the employee requested representation and the employee reasonably believed that such investigation would result in disciplinary action.

On Saturday, February 20, Underwald was not acting in his capacity as a supervisor of Respondent. Instead, he was acting in his capacity as a sheriff and on that day he was paid by the Sheriff's Department. He came upon a New Jersey Bell truck which was located in an unpopulated area and which appeared to be abandoned. When two persons, whom he did not then know, came out of a bar and approached the truck, in conformance with standard police procedure, he asked them for their I.D.s and asked the driver whether he would take a breathalyzer test. McLellan and Reilly were not aware that Underwald was a New Jersey Bell supervisor and consequently, did not ask for union representation. While it is clearly understandable why the two employees did not ask for representation, nevertheless, the rights afforded by *Weingarten* apply only where the employee requests representation. General Counsel has cited no case which establishes that an employer has an affirmative duty to ask the employee whether he or she wishes to be represented.

I find that General Counsel has not sustained its burden of showing that Respondent violated the Act by not providing union representation to the two employees. Underwald was not acting in his capacity as a supervisor of Respondent but instead was acting in his capacity as Sheriff. McLellan and Reilly did not request representation and the situation was not one where the ''employee reasonably believes the investigation will result in disciplinary action.'' Accordingly, the allegation is dismissed.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in the unfair labor practices alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The complaint is dismissed.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.